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No. 254

In the Supreme Court of the United States

OCTOBER TERM, 1962

BILLY GILBERT NICHOLSON, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 12–16) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1962. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Stewart to and including July 18, 1962. The petition for a writ of certiorari was filed on July 14, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the facts recited in affidavits supporting a warrant for the search of petitioner's home showed

probable cause for believing that he was conducting a bookmaking operation in violation of the federal wagering tax law.

STATEMENT

On August 11, 1960, an information was filed in the United States District Court for the Middle District of Tennessee charging petitioner, in two counts, with willful failure to register as a person in the business of accepting wagers, as required by 26 U.S.C. 4412, and with failure to pay the occupational tax imposed by 26 U.S.C. 4411 (R. 73a–74a). On October 18, 1960, the United States, acting under 26 U.S.C. 7302, filed a libel in the same court, seeking forfeiture of $7,198 ($6,498 found on the person of petitioner and $700 in a metal box on the premises searched at the time of petitioner's arrest), alleging that this money was used or intended for use in carrying on a wagering business without paying applicable taxes (R. 61a–64a). Petitioner filed a motion to suppress as evidence certain paraphernalia seized at the time of the search and his arrest (R. 16a–17a).

By agreement of the parties, the criminal charge, the libel and the motion to suppress were tried together (R. 55a–56a). The jury found petitioner guilty upon both counts of the information (R. 18a–19a). The court denied the motion to suppress (R. 19a–20a) and found in favor of the government on the libel (R. 67a–70a). In denying petitioner's motion for a new trial, the court filed a memorandum opinion discussing fully all questions raised (R. 22a–38a; Pet. App. B 17–23). Petitioner was sentenced to imprisonment for a period

of six months on the first count of the information and to a fine of $1,000 on the second, $500 of which was suspended on the condition that he should not violate the same statutes within a period of three years (R. 20a–22a). The court of appeals affirmed (R. 4c–8c).

The sole question presented by the petition is the sufficiency of the affidavits supporting the warrant for a search of petitioner's house. The affidavits of James K. Smith and Francis Q. Smith, both special agents in the intelligence division of the Internal Revenue Service, disclose the following facts (R. 5a–9a; Pet. App. D, 26–32):

(1) Petitioner, who was known sometimes to use the name Robert Walker, resided with his mother-in-law at 2806 Westwood Avenue in Nashville.

(2) There were three telephones at that address, two (Cypress 5534 and 5535) in the name of Robert Walker and one in the name of his mother-in-law.

(3) Records of the telephone company showed unusual long-distance activity on petitioner's telephones. Approximately 293 long-distance calls were charged to CY–5534 and CY–5535 between January 1, 1960, and April 15, 1960.

(4) Numerous long-distance calls from these telephones were made to two known bookmakers in Birmingham, Alabama, and Biloxi, Mississippi, whose names and telephone numbers were given.

(5) Numerous long distance calls were placed to CY–5534 and CY–5535 during this period from known bookmakers and gamblers in Clarkson, Georgia, Philadelphia, Pennsylvania, New Orleans, Louisiana, and

Jacksonville, Florida, whose names and telephone numbers were given.

(6) Such long-distance telephone activity is characteristic of bookmaking operations.

(7) Petitioner is a known gambler and bookmaker. One of the affiants had personally participated in his arrest at the same address and observed a bookmaking operation. In amplification of this allegation, it was stipulated, at the request of petitioner, that he had been arrested twice for gambling violations, once in 1955 and once prior thereto, but that neither arrest resulted in prosecution (R. 1b, 41a–42a).

(8) Investigation disclosed no record of the issuance of a wagering tax occupational stamp covering this period, either to petitioner or anyone else at the Westwood Avenue address.

ARGUMENT

1. Petitioner's suggestion that the affidavits were insufficient because based on hearsay is wholly without merit. *Brinegar* v. *United States*, 338 U.S. 160, 172–173; *Draper* v. *United States*, 358 U.S. 307, 311–312; and *Jones* v. *United States*, 362 U.S. 257, 267–272, have settled the question, rejecting a contrary dictum in *Grau* v. *United States*, 287 U.S. 124, 128. Nor is there any rule that hearsay alone is not enough. It suffices if there is "a substantial basis for crediting the hearsay." *Jones* v. *United States*, *supra*, at 272. The information may become trustworthy after corroboration by independent evidence, or it may be inherently reliable because of its source. No one will question the trustworthiness of telephone

company records. Unlike the tip of an unknown informer, business records are acceptable on their face. See 28 U.S.C. 1732. Moreover, in this case, there were other independent circumstances corroborating the indications provided by the telephone records. Petitioner's reputation as a bookmaker and the observations made on his prior arrest at the same address were not related to the records. Even if "in themselves totally innocent," these facts sufficiently verified the inferences derived from the telephone records. *Jones* v. *United States, supra,* at 269–270.

2. Petitioner next argues that, even accepting the hearsay, the totality of the information recited in the affidavits does not meet the standard of "probable cause." To substantiate this, he applies the rule that circumstantial evidence must exclude every reasonable hypothesis consistent with innocence. But, of course, that test, appropriate in determining the sufficiency of the evidence on the question of guilt or innocence, does not govern here. The standard applicable on the issuance of a search warrant is not proof beyond a reasonable doubt, but "probable cause" to believe the offense has been committed. And, as the name implies, that criterion involves only "probabilities," not certainties. *Brinegar* v. *United States, supra,* at 175.

Judged under the proper standard, the recitals of the affidavits that many long distance calls had been made on petitioner's telephones, to and from known gamblers and bookmakers, considered in relation to the fact that petitioner himself was a known gambler whose operations some years before had been per-

sonally witnessed by one of the affiants, constituted ample ground for belief that petitioner was engaging in a wagering business.[1]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[1] Petitioner's reliance upon *United States* v. *Lassoff*, 147 F. Supp. 944 (E.D. Ky.) is not justified. The substance of the court's holding there was that the affidavit was insufficient because its allegations were all conclusory, a criticism which cannot be made of the detailed factual allegations of the affidavits herein. More pertinent to the facts presented by the instant case are *United States* v. *Schwartz*, 151 F. Supp. 399 (W.D. Pa.), and *United States* v. *Jacobson*, 198 F. Supp. 386 (D. Conn.).

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